United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT ISAAC FRANKIE BATTS

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 20101

ISAAC FRANKIE BATTS
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

John P. McKenna
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Washington, D.C. 20005

Counsel for Appellant
(By Appointment of this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court err in charging the jury that the defendant had the burden of proof on the defense of alibi?

2. Did the District Court err in giving the missing witness charge in connection with defendant's alibi defense when the record before the Court contained no evidence that the witnesses in question were available or, if available, were any more available to defendant than to the prosecution?

3. Should the Court decide Questions 1 and 2 even though the errors in the charge were not objected to at the trial?

BRIEF FOR APPELLANT ISAAC FRANKIE BATTS

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* Cases chiefly relied upon are marked by asterisks

JURISDICTIONAL STATEMENT

Appellant Isaac Frankie Batts (hereinafter referred to as defendant) was indicted on May 2, 1966, for robbery in violation of D.C. Code § 22-2901. Defendant was tried and convicted on July 12, 1966, in the United States District Court for the District of Columbia, Criminal Action No. 568-66. On July 26, 1966, the trial court sentenced defendant to from three to nine years in jail.

This is an appeal from that conviction and sentence. Leave to proceed in forma pauperis was granted by the District Court on August 10, 1966. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On April 1, 1966, a High's Dairy store located at 1354 Brentwood Road, N.E. in the District of Columbia was robbed of approximately $30. (Tr. 21-22). Defendant Isaac Frankie Batts was arrested on April 8, 1966 (Tr. 49-50), and indicted on May 2, 1966, for robbery in violation of D.C. Code § 22-2901.

Defendant was in jail continuously between the time of his arrest and trial. (Tr. 55-56). The trial lasted one day (July 12, 1966) and posed only a single issue. The clerk on duty at the store at the time of the robbery identified the defendant as the robber (Tr. 24); defendant denied the charge. (Tr. 54, 56). Defendant testified that, at the time of the robbery, he was working elsewhere as a painter's helper in the company of two men whom he knew only by their first names of Dailey and Ellis. (Tr. 53, 56, 58-59). Neither the prosecution nor the defense called Dailey or Ellis as witnesses.

The court charged the jury without objection as follows with respect to defendant's alibi:

> "Also ladies and gentlemen of the jury, the defense interposed was that the defendant was not present at the time in question.
>
> "Now this is known in the law as an alibi. That is that the defendant was at another place at the time of the commission of the alleged offense. The Court instructs the jury that such defense is as proper and legitimate, if proved, as any other defense, and all evidence bearing upon that particular point should be carefully considered by you.
>
> "If in view of the evidence in this particular case, the jury have a reasonable doubt as to whether or not the defendant was in some other place at the time of the crime, they should give the defendant the benefit of the doubt and find him not guilty.

"As regards the defense of alibi, the jury is instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to acquittal. It is sufficient if the evidence upon which he relies raises a reasonable doubt of the presence at the time and place of the commission of the robbery.

"Now, in all cases where the presence of the accused at the time and place, at the time of commission of the crime is essential to his guilt, the Government has the burden of proving such presence at the time and place in question. That is April 1, 1966, High's Store, at approximately 1:00 o'clock -- 12:00 o'clock, five minutes of twelve.

"You are also instructed, ladies and gentlemen of the jury, that if a witness is peculiarly available to one party and that witness is not called, then you may, you are not forced, but you may infer from the absence of any witness who is peculiarly available to one party, that if that witness were called, the testimony given by that witness would not be favorable to the party who has failed to call the witness. Unless a satisfactory explanation is given to you for the absence of that particular witness or witnesses." (Tr. 80-81).

Defendant was convicted and sentenced to from three to nine years in jail. (Tr. 85, 89).

STATUTES AND RULES INVOLVED

(1) D.C. Code § 22-2901 (1961)

"Robbery:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any

person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

(2) Federal Rule of Criminal Procedure 52(b):

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. The trial court erroneously charged the jury that the defendant had the burden of proof on the issue of alibi.

2. The trial court charged the jury that they could infer that defendant's alibi witnesses would have testified unfavorably to the defendant had they been called. This was error since the record did not establish that the witnesses were peculiarly available to defendant.

3. Each of these instructions was plain error. Defendant's failure to object does not, therefore, preclude their being raised on appeal.

SUMMARY OF ARGUMENT

The court charged the jury that defendant's alibi defense was "proper and legitimate, if proved." This

placed the burden of proof upon defendant. The law is clear, however, that the prosecution carries the burden of proving the defendant guilty beyond a reasonable doubt, and that this burden covers the alibi defense.

The trial court also erred by giving a missing witness charge with respect to defendant's alibi witnesses. Because of the absence of these potential witnesses, the court charged the jury that they could infer that such witnesses would have testified unfavorably to defendant had they been called. This charge was based upon the assumption that the witnesses were "peculiarly available" to defendant. The record, however, does not support the assumption. There was no evidence that the witnesses were available, or, if available, that they were any more available to defendant than to the prosecution.

Defendant did not object to the trial court's charge. While this ordinarily might amount to a waiver of any errors, plain error may be raised on appeal despite the absence of objection at the trial level. Both of the erroneous instructions outlined above come within the plain error exception and are properly before this Court for decision.

ARGUMENT

I. The District Court Erred in Charging the Jury that the Defendant had the Burden of Proof on the Defense of Alibi

With respect to this point, appellant desires the Court to read pages 80-81 of the reporter's transcript.

The prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof includes the alibi defense. E.g., United States v. Marcus, 166 F.2d 497, 504 (3rd Cir. 1948); Goodall v. United States, 86 App. D.C. 148, 152-53, 180 F.2d 397, 401-02 (D.C. Cir.), cert. denied, 339 U.S. 987 (1950). The trial court, however, placed this burden upon the defendant. At the very outset of that portion of the charge dealing with alibi, the trial court referred to the defense as "proper and legitimate, if proved." (Tr. 80). The "if proved" language is, of course, the rubric normally used when allocating the burden of proof.

In the same vein, the very next sentence of the charge referred to the jury having a reasonable doubt regarding the defendant's presence. (Tr. 80). But the court was not referring to having a reasonable doubt about the defendant's presence at the scene of the crime, but rather

to defendant's presence "at some other place." Once again, the focus of the charge is upon the defendant convincing the jury that his story is true rather than the prosecution convincing the jury that its story is true.

The case is very close to United States v. Barrasso, 267 F.2d 908, 910 (3rd Cir. 1959), a bank robbery case in which the court charged the jury:

> "So alibi, if you believe the testimony as to his being elsewhere, is a perfectly good defense."

The Court of Appeals reversed the convictions because the "if you believe" language "may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense."

After the trial court had clearly erred in its charge, it went on to instruct the jury correctly that the burden of proof was on the prosecution. (Tr. 81). In other words, in one breath the court placed the burden of proof on the defendant, while in the next breath it placed it upon the prosecution where it belonged.

The current portion of the charge did not neutralize the error. McFarland v. United States, 85 App. D.C. 19, 174 F.2d 538 (D.C. Cir. 1949) is decisive on this point.

This was a perjury prosecution where defendant was accused of having sworn falsely in a divorce proceeding that he was a resident of the District of Columbia. The case turned on thether the statutory requirement of residence was equivalent to domicile. The trial court first erroneously charged that it was not, and then correctly charged that it was. This Court reversed the conviction:

> "If a charge to a jury, considered in its entirety, correctly states the law, the incorrectness of one paragrpah or one phrase standing along ordinarily does not constitute reversible error; but it is otherwise if two instructions are in direct conflict and one is clearly prejudicial, for the jury might have followed the erroneous instruction." 85 App. D.C. at 20, 174 F.2d at 539.*/

The Court then quoted the Supreme Court in Bollenbach v. United States, 326 U.S., 607, 613 (1946): "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Naples v. United States, 120 App. D.C. 123, 344 F.2d 508 (D.C. Cir. 1964) points in the same direction. This

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*/ Accord: Perez v. United States, 297 F.2d 12, 16 (5th Cir. 1961) ("The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. . . . Most important, in no condition of proof is it permissible to leave with the jury the idea that it had become the duty of the defendant to establish his innocense to obtain an acquittal.")

Court reversed a conviction in part because of errors in the trial court's charge with respect to the burden of proof on the insanity defense. The Court pointed out that "some parts of its charge correctly instructed the jury that the burden of showing freedom from mental illness rested on the prosecution, other parts of the charge implied the contrary." This, said the Court, was improper:

> "Though it is difficult, it is also necessary, to cast instructions continually in terms of the Government's burden to show sanity beyond reasonable doubt." 120 App. D.C. at 131, 344 F.2d at 416.

II. The District Court Erred in Giving the "Missing Witness" Charge in Connection With Defendant's Alibi Defense When the Record Before the Court Contained No Evidence That the Alleged Witnesses Were Peculiarly Available to Defendant

With respect to this point, appellant desires the Court to read pages 55-56, 59-61, and 66-67 of the reporter's transcript.

The court charged:

> "You are also instructed, ladies and gentlemen of the jury, that if a witness is peculiarly available to one party and that witness is not called, then you may, you are not forced, but you may infer from the absence of any witness who is peculiarly available to one party, that if that witness were called, the testimony given by that witness would not be

> favorable to the party who has failed to call the witness. Unless a satisfactory explanation is given to you for the absence of that particular witness or witnesses."

The court did not specifically refer to the alibi witnesses. Nor did it indicate whether these witnesses were peculiarly available to the defendant rather than the prosecution.

It is clear, however, that the thrust of the charge was to permit the jury to infer that the alibi witnesses would have testified adversely to defendant, and that defendant had not called them for precisely this reason although they were readily available to him. There is no other possible meaning. To begin with, the missing witness charge followed on the heels of the court's treatment of the alibi defense. Moreover, there were no potential witnesses other than the alibi witnesses. Defendant had injected these witnesses into the case, and the jury was certain to interpre the charge as reflecting on defendant's failure to call these witnesses. In fact, the prosecution made precisely this point in its closing argument:

> "The fact is he doesn't bring in any witnesses. There are no witnesses to back up his story, Ellis and Dailey, if these two people exist.
>
> "Assume they do exist, they are not here. They haven't been brought down. They haven't supported his story . . .." (Tr. 66-67).

This charge would have been proper only if these witnesses had been peculiarly available to the defendant, and

it was upon precisely this factual assumption that the trial court based its charge.

There are two facets to the "peculiarly available" requirement. First, it must be shown that the witnesses are "available" to testify. Second, it must be shown that the witnesses' availability is peculiar to one of the parties. Neither of these showings was made in this case.

To begin with, there was no evidence one way or the other about the witnesses' availability. In this state of the record, no conclusion at all is justified, and the court's charge was patently erroneous. Moreover, the potential witnesses were not "peculiarly" available to defendant. They had no connection with defendant other than working on the same job. Moreover, defendant's employment and that of the missing witnesses was not formalized. They did not punch time clocks their employer kept no bookkeeping records; they were paid in cash for their efforts out of their employer's pocket. (Tr. 59-61). Employment was on a day to day basis; defendant testified that he went by each morning to see if he was needed (Tr. 60). Defendant did not even know the witnesses' last names. (Tr. 56).

The record, therefore, shows only a tenuous connection between defendant and the potential witnesses. For all that the record shows, they were equally available to the

prosecution. But even more importantly, defendant was in jail between his arrest and trial (Tr. 55-56). How can witnesses be deemed peculiarly available to a man in jail? Admittedly, defendant had the assistance of court-appointed counsel, but this is no substitute for continuous personal efforts by the defendant to unearth the missing witnesses. The charge, therefore, was error.

III. The Errors in the Court's Charge Relating to the Alibi Defense Constitute Plain Error and are Properly Before this Court Even Though no Objection was Taken to the Charge

The failure to object to the foregoing errors in the trial court's charge does not preclude their being raised on appeal. Under the cases and Rule 52(b) of the Rules of Criminal Procedure, plain error may be noticed even though not raised at trial. Both of the errors outlined above come within this rule.

This Court held in McDonald v. United States, 109 App. D.C. 98, 284 F.2d 232 (1960) (per curiam) that it was plain error to fail to charge on the burden of proof. Placing the burden of proof upon the defendant, as was done here, presents an a fortiori situation. This could hardly be otherwise since there is probably nothing in the criminal

law that is more fundamental than the principle that the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt.

The situation is not so clear with respect to the missing witness charge. In McAbee v. United States, 111 App. D.C. 74, 77, 294 F.2d 703, 706 (D.C. Cir. 1961) cert. denied, 368 U.S. 961 (1962), the Court said that a missing witness charge "even if erroneous is not plain error." The statement was mere dictum and no authority was cited. Moreover, one judge dissented from the proposition. Id. at 708. The point, therefore, is open.

Regardless of whether the charge would be plain error standing alone, the Court should hold that it was plain error in the circumstances of this case. Alibi was the only factual point in issue at the trial; the whole case hinged upon it. The charge, however, precluded the possibility of the jury treating it fairly from the defendant's point of view. After first erroneously instructing the jury that the defendant had the burden of proof, the trial court further undercut the defense with the missing witness charge. This merely compounded the first error in the charge which admittedly constituted plain error. Since the error complained of went to the

basic issue in the case, an issue that already had been erroneously treated in the charge, this Court should recognize it as plain error.

There is another reason for deciding the propriety of the missing witness charge. The trial court clearly erred in placing upon defendant the burden of proving the alibi defense. This will require a new trial at which the missing witness issue may well arise. The point should be clarified for the trial court.

The words of this Court in Robertson v. United States, 84 App. D.C. 185, 186, 171 F.2d 345, 346 (D.C. Cir. 1948) (per curiam) might well have been written with the trial court's charge in mind:

> "However, we cannot escape the conclusion that in both instances the errors complained of were plain; that the natural and probable influence upon the jury was prejudicial, and that the right of appellant to a fair and impartial verdict of the jury was substantially affected. Under these circumstances we are convinced that we should apply Rule 52(b) of the Federal Rules of Criminal Procedure and take notice of the errors, although they were not brought to the attention of the trial court."

CONCLUSION

Accordingly, the conviction should be reversed and remanded for a new trial.

Respectfully submitted,

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Counsel for Appellant
(By appointment of this Court

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief for Appellant on the United States of America on this 23rd day of November, 1966, by mailing a copy, postage prepaid, to the Office of the United States Attorney, Room 3136-C, United States Court House Building, 3rd and Constitution Avenue, N.W., Washington, D.C. 20001.

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REPLY BRIEF FOR APPELLANT ISAAC FRANKIE BATTS

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC FRANKIE BATTS,
Appellant,

v. No. 20,401

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR APPELLANT

The Government's brief contains only a sketchy response to the arguments made in appellant's (hereafter "defendant") main brief. The Government asserts that defendant was not prejudiced by the trial court's erroneous instructions, and cites several cases in support.*/

The three cases cited have nothing to do with the issues which this Court must decide. Kelly v. United States, ___ App. D.C. ___, 361 F.2d 61 (D.C. Cir. 1966) (per curiam) did not involve an erroneous charge, but rather the trial court's refusal to give a charge requested by the defendant on the issue of self defense. The trial court gave other instructions -- the accuracy of which was not contested -- in its stead. This Court held that the refusal of the requested charge was not significant enough to require reversal. The issue in Jackson v. United States, ___ App. D.C. ___, 359 F.2d 260 (D.C. Cir. 1966), was a variance between indictment and proof. This Court, after casting doubt upon the significance of the

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*/ The Government in its counterstatement of the case says that "there was a second witness who identified appellant as the robber." This is not strictly accurate. The second witness, Mr. Alonzo Butler, testified that he had seen the defendant outside the dairy store prior to the robbery, had seen him enter the store, and had seen the defendant running down the street after the robbery without anything in his hands. (Tr. 31-33, 44). Mr. Butler did not witness the robbery.

variance, held that it did not constitute plain error since there had been no objection to the introduction of the variant evidence. Finally, in Cross v. United States, 122 App. D.C. 283, 353 F.2d 454 (D.C. Cir. 1965), the Court found that a misstatement of the evidence by the prosecutor in his closing argument, which had been corrected by defendant's counsel in his closing, was not reversible error. The Government's brief does not explain how these cases will assist the Court in deciding the instant appeal.

The defendant in Cross argued that the impact of the alleged errors was heightened by the fact that the evidence of defendant's guilt was "paper-thin." This Court, citing Jones v. United States, 119 App. D.C. 213, 338 F.2d 553, 554 n.3 (D.C. Cir. 1964) (per curiam), recognized that the thinness of the Government's evidence might require reversal on the basis of trial errors which ordinarily would not call for reversal. The Government in its brief apparently wants to stand this principle on its head so that errors which would otherwise require reversal would be overlooked in a case where the Government's evidence is stronger. Neither Cross nor Jones supports this curious and discredited approach.*/ Cf.

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*/ The need for correct instructions would seem, if anything, particularly pressing when the case against the defendant is strong.

United States v. Palermo, 259 F.2d 872, 881-82 (3d Cir. 1958). Moreover, this discussion is beside the point since the law is clear that the errors in the trial court's charge, if cognizable by this Court, require reversal. There is, therefore, no occasion to worry about balancing the error against the strength of the Government's case.

The prejudice to defendant which resulted from the trial court's erroneous instructions can be illustrated by an additional error that occurred during the trial. On cross examination of defendant, the prosecution elicited admissions that defendant had been convicted of simple assult in 1960 and unlawful entry in 1965. (See Tr. 56-57). This automatic introduction of prior convictions conflicted with the holdings in Luck v. United States, 121 App. D.C. 151, 348 F.2d 763 (D.C. Cir. 1965) and Brown v. United States, ___ App. D.C. ___, ___ F.2d ___ (D.C. Cir. No. 20,041, November 10, 1966). These cases make clear that the introduction of prior convictions is discretionary with the trial judge and calls for an informed evaluation of the relevance of such convictions to the defendant's credibility and the prejudice to the defendant that inevitably will result from their introduction. The need for such an informed exercise of discretion was particularly crucial in this case since the entire defense hinged upon the

defendant's credibility, and both of the convictions were misdemeanors, one of which was almost six years old.

Unfortunately, this point is foreclosed on appeal since trial counsel did not object to the evidence and did not call upon the court to exercise its discretion.*/ See Stevens v. United States, ___ App. D.C. ___, ___ F.2d ___ (D.C. Cir. No. 19883, October 20, 1966) (per curiam); Walker v. United States, ___ App. D.C. ___, 363 F.2d 681 (D.C. Cir. 1966) (per curiam). Even so, the error underscores the prejudice resulting from the erroneous instructions which are the basis of this appeal. The only real issue in the case was alibi, and defendant had to rely entirely upon his own testimony. This testimony was seriously compromised by the erroneous introduction of prior convictions without inquiry by the court as to the propriety of their admission. This being the case, proper instructions to the jury were crucial. And yet, it was at precisely this point that the trial court's charge erroneously placed upon defendant the burden of proof with respect to alibi and permitted the jury to infer that the potential alibi witnesses would have refuted defendant's testimony. Coming on top of the evidence of prior convictions, this was fatal to the defense.

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*/ Of course, at a new trial appropriate objections can be made should the prosecution again seek to introduce the convictions.

Defendant was precluded from having a fair opportunity to establish his defense to the satisfaction of the jury. A new trial will give him such an opportunity.

Respectfully submitted,

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(By appointment of this Court)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply Brief for Appellant on the United States of America on this 19th day of January, 1967, by mailing a copy, postage prepaid, to the Office of the United States Attorney, Room 3136-C, United States Court House Building, 3rd and Constitution Avenue, N.W., Washington, D.C. 20001

John P. McKenna

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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,401

ISAAC FRANKIE BATTS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Assistant United States Attorneys.

Cr. No. 568-66

QUESTIONS PRESENTED

1. Whether the jury instructions on the defense of alibi were plain error?

2. Whether including an instruction on missing witnesses in the jury instructions was plain error?

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,401

ISAAC FRANKIE BATTS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Pursuant to this Court's Rule 17(3), the government accepts the statement of the case in Brief for Appellant, pp. 1-3, with one exception. In addition to the store clerk, there was a second witness who identified appellant as the robber, a man who had seen appellant 15 or 20 times previously and knew his first name (Tr. 30-35).

SUMMARY AND ARGUMENT

The jury instructions on alibi and missing witnesses were not plain error.

(Tr. 30-35, 56, 58-61, 80-81, 84)

Appellant contends (App. Br. 6-9) that the trial court erroneously placed the burden of proving alibi on appellant by using the two words "if proved" in the following sentence of the jury instructions--"The Court instructs the jury that such defense [alibi] is as proper and legitimate, if proved, as any other defense, and all evidence bearing upon that particular point should be carefully considered by you" (Tr. 80). But as the excerpt from the instructions quoted in appellant's brief (pp 2-3) shows, the trial judge followed that sentence with clear and detailed instructions that the burden of proof was on the government and that (Tr. 81):

> the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to acquittal. It is sufficient if the evidence upon which he relies raises a reasonable doubt of the presence at the time and place of the commission of the robbery.

The jury could not have misinterpreted such instructions.

Appellant also contends (App. Br. 9-12) that the missing witness instructions were improper because there was no evidence that appellant's alibi witnesses were peculiarly available to him. However, the record shows that appellant testified during a one-day trial that at the time of the robbery he was at his

employment with "Ellis" and "Deal." Appellant worked as a painter for a licensed business that had an "office" where clothes and paint were stored. "Ellis" had the license and was appellant's employer (Tr. 56, 58-61). There was no evidence further identifying the two missing witnesses or the location of the business. The government had no means of discovering the names and addresses of these witnesses before trial, but appellant knew them and their place of employment. Surely, appellant did have access to the witnesses but the government did not.

In addition, no objection was made to the jury instructions. Indeed, defense counsel said about the instructions, "We are content, Your Honor" (Tr. 84). The evidence of guilt--testimony of two eye witnesses, one of whom had known appellant previously--was strong. In these circumstances, there was neither prejudicial nor plain error. E.g., Kelly v. United States, ___ U.S. App. D.C. ___, 361 F.2d 61 (1966); Jackson v. United States, ___ U.S. App. D.C. ___, 359 F.2d 260 (1966); Cross v. United States, 122 U.S. App. D.C. 380, 353 F.2d 454 (1965).

CONCLUSION

THEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

/s/ DAVID G. BRESS
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/s/ FRANK Q. NEBEKER
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/s/ DAVID N. ELLENHORN
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Assistant United States Attorney

/s/ THEODORE WIESEMAN
THEODORE WIESEMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for appellee has been mailed to attorney for appellant, John P. McKenna, Esq., Union Trust Building, 740 15th Street, N.W., Washington, D.C. 20005, this 9th day of January, 1967.

/s/ THEODORE WIESEMAN
THEODORE WIESEMAN
Assistant United States Attorney